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IN THE

# Supreme Court of the United States

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**No. 351.** **October Term, 1935.**

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TERMINAL WAREHOUSE COMPANY (Plaintiff-Appellee in the Court Below),

*Petitioner,*

*v.*

PENNSYLVANIA RAILROAD COMPANY and MERCHANTS WAREHOUSE COMPANY (Defendants-Appellants in the Court Below),

*Respondents.*

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# Brief on Behalf of Petitioner.

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JOHN J. HICKEY,
WALTER W. AHRENS,
Southern Building,
Washington, D. C.

THOMAS RAEBURN WHITE,
RICHARD C. BULL,
WHITE, MARIS & CLAPP,
Land Title Building,
Philadelphia, Pa.

WILLIAM A. SCHNADER,
Packard Building,
Philadelphia, Pa.

International, 236 Chestnut St., Philadelphia

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IN THE

# Supreme Court of the United States.

No. 351. October Term, 1935.

TERMINAL WAREHOUSE COMPANY (PLAINTIFF-APPELLEE IN THE COURT BELOW),

*Petitioner,*

*v.*

PENNSYLVANIA RAILROAD COMPANY AND MERCHANTS WAREHOUSE COMPANY (DEFENDANTS-APPELLANTS IN THE COURT BELOW),

*Respondents.*

## BRIEF ON BEHALF OF PETITIONER.

## I. REFERENCES TO THE OPINIONS OF THE COURTS AND OF THE INTERSTATE COMMERCE COMMISSION, RELATIVE TO THIS AND A PRIOR PROCEEDING.

### Opinions of the District Court.

All of which were written by Judge Oliver B. Dickinson—

Dismissing statutory demurrers, filed November 2, 1932. Record 96. Reported as *Bailey v. Pennsylvania Railroad Company, et al.*, 4 Fed. Supp. 786.

Granting petitioner's motion for production of writings, under 28 U. S. C. § 636, filed October 20, 1933. Record 129. Not reported.

Dismissing motion for new trial. Two opinions were filed, May 8, 1934, and June 1, 1934. Record 598, 605. Reported as *Terminal Warehouse Company v. Pennsylvania Railroad Company, et al.*, 7 Fed. Supp. 484.

Sur rule for judgment for treble damages and for allowance of counsel fees, filed June 22, 1934. Record 625. Not reported.

**Opinion of the Circuit Court of Appeals for the Third Circuit.**

Written by Judge Thompson (Judges Buffington and Davis sitting with him), filed July 10, 1935, reversing the judgment of the District Court. Record 658. Reported as *Pennsylvania Railroad Company, et al. v. Terminal Warehouse Company*, 78 F. (2d) 591.

**Report of Interstate Commerce Commission in Prior Proceeding.**

Issuing cease and desist order and denying claim for reparation. Record 476. Reported as *Gallagher v. Pennsylvania Railroad Company*, 160 I. C. C. 563.

**Opinion of Statutory Court in Prior Case.**

Sustaining the opinion of the Commission, reported as *Merchants' Warehouse Co. v. United States, et al.*, 44 F. (2d) 379.

**Opinion of This Court in Prior Case.**

Affirming the decision of the Statutory Court, reported as *Merchants' Warehouse Company v. United States, et al.*, 283 U. S. 501.

## II. STATEMENT OF THE CASE.

This is an action at law by petitioner, Terminal Warehouse Company, against respondents, Pennsylvania Railroad Company and Merchants Warehouse Company, to recover damages for injuries suffered in consequence of respondents' violation of Sections 1 and 2 of the Sherman Anti-Trust Act.

Damages are recoverable under Section 4 of the Clayton Act for injuries caused by

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." (Section 1 of the Sherman Act.)

and by a violation of the prohibition

> " . . . to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." (Section 2 of the Sherman Act.)

Sections 1 and 2 of the Sherman Act and 4 of the Clayton Act are printed in full in the margin.[1]

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[1] *Section 1 of the Sherman Act,* reads as follows:

"TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL; PENALTY. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." (July 2, 1890, c. 647, § 1, 26 Stat. 209, 15 U. S. C. § 1.)

*Section 2 of the Sherman Act,* reads as follows:

"MONOPOLIZING TRADE A MISDEMEANOR; PENALTY. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." (July 2, 1890, c. 647, § 2, 26 Stat. 209, 15 U. S. C. § 2.)

Petitioner is engaged in the public warehousing business. It maintains eleven large warehouses served by railroad sidings. (R. 179.) The business of a public warehouseman consists in receiving, storing, handling, shipping, reshipping, and distributing package freight. Such freight when received at his warehouses from the carriers is ordinarily in carload lots, and is distributed, usually in less than carload lots, to his customers, goods as to which immediate delivery is not desired being stored. (R. 175-183.) The public warehouseman serves the double purpose of furnishing storage facilities for customers who do not have warehouses of their own and enabling customers to receive shipments of goods at carload rates, although, except for the services of the warehouseman, freight rates at the higher "less than carload" rates would have to be paid. (R. 176.)

The warehouseman also performs incidental services, such as loading and unloading freight, separating the packages destined for his customers, recooperage and reconditioning of injured packages, payments of freight rates on behalf of customers, and other such matters. (R. 180-182.)

The advantage to the customer consists in the accommodation which he receives in the matter of handling and storage of goods and in being given the advantage of carload rates for freight, the reduction in freight rates being generally sufficient to pay for the cost of handling, distribution and incidental services where the goods are not put in storage. (R. 176-177.)

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*Section 4 of the Clayton Act*, reads as follows:

"SUITS BY PERSONS INJURED; AMOUNT OF RECOVERY. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Oct. 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U. S. C. § 15.)

A similar provision is found in the Sherman Act, § 7, restricted in its operation to the particular act.

Respondent, Merchants Company, is in the same business as petitioner and maintains about the same number of warehouses. (R. 156.) There are other warehouse companies operating in Philadelphia. Respondent railroad company is a common carrier; its lines extend to most of the important centres of population in Eastern United States. (R. 154.)

The two respondents made a series of contracts beginning many years ago, which provided in effect that the Merchants Company would give to the Railroad Company all the shipments it could control, would accord preferential treatment to traffic moving over the lines of the Railroad Company, and would not extend the use of its facilities to traffic of any other railroad. In return the Railroad Company agreed to pay the Merchants Company certain sums (herein referred to as "allowances"), ostensibly for services rendered in connection with the receipt and delivery of freight at its warehouses, and to furnish siding connections and facilities without expense to the Merchants Company. (Plaintiff's Exhibit 1, R. 18-93.) In certain of the agreements the Railroad Company also contracted not to enter into similar arrangements with any other warehouse company. (R. 60.)

These contracts were carried out by both parties for many years. Practically all freight destined to or coming from the warehouses of the Merchants Company was routed over the lines of the Railroad Company (Defendants' Exhibit 6, R. 273, 443-449); the Railroad Company fully carried out its part of the agreement, did not enter into similar arrangements with any other competitive warehouse company and did not pay any allowances to any other competitive company.

In order further to promote the purposes of the contracts the Railroad Company designated the warehouses of the Merchants Company as freight stations (R. 371-372) and actively solicited freight to be consigned thereto. (Plaintiff's Exhibit 3, R. 154.) It also permitted inbound loaded cars consigned to Merchants Company to remain on its tracks for an unlimited time without demurrage charges (R. 169, 279, 369).

The Railroad Company owned a considerable block of the stock of the Merchants Company (R. 140). It profited by the freight charges on the increased volume of freight moving over its lines to and from the Merchants Warehouses; the Merchants Company in turn profited by the payment of allowances to it which during the period in suit amounted to $634,886.16 (R. 248), and by the increased volume of business it enjoyed owing to its ability, by reason of the favors it received, to quote lower prices than its competitors.

As expressed in one of the opinions of the District Court—

> "Beyond all doubt this arrangement was not only directly profitable to the favored warehouseman but it gave it possession of a weapon for use in its fight with its competitors for business. The carrier and the warehouseman were both selfishly interested in extending the business of the latter to the point, if possible of attainment, of an absolute monopoly of the whole warehousing business." (R. 599.)

Petitioner proved that by reason of the "allowances" and other concessions the Merchants Company could and did give free loading, unloading, handling and distribution services to its customers upon a considerable portion of their business, and otherwise cut its normal rates. (R. 158,

159, 187, 189, 239, 241, 243, 276-277, 333, 335, 338, 352, 354, 357, 360, 363); that it could and did free its customers from charges for demurrage (R. 163, 239, 240, 243, 311-313, 357-358, 364), and that petitioner, in order to meet this competion was obliged to absorb demurrage charges, to give free loading, unloading, handling and distribution service in certain cases although it received no allowances, and otherwise to lower its rates below a fair charge. (R. 189-190, 196.) This necessarily resulted in a heavy financial loss. The amount of the loss was proven in a very precise manner by showing in detail the tonnage of freight which had passed through petitioner's warehouse during the period in suit, the amount of the charges which petitioner had been able to collect thereon, and the amount which it would have been able to obtain had it not been for the unfair competition. An elaborate computation submitted by petitioner showed actual damages of this character amounting to $536,278.35. (R. 235-237.)

Many of the facts shown by the record in this case were reviewed by this Court in *Merchants' Warehouse Company v. United States, et al.*, 283 U. S. 501, in which this Court affirmed an order of the Interstate Commerce Commission, which required respondent railroad company, among other carriers, to "cease and desist" from the continued payment of allowances (see *Gallagher v. Pennsylvania Railroad Company*, 160 I. C. C. 563).

In the proceedings before the Interstate Commerce Commission, petitioner had requested reparation for the violations of the Interstate Commerce Act disclosed in that proceeding, which related in part to an earlier date than the acts complained of in the case at bar. Reparation was denied on the correct ground that the business losses peti-

tioner sought to recover were not "attributable directly" to the violations of the Interstate Commerce Act shown in that case (160 I. C. C. at 569).

Respondents' contention that the refusal of reparation barred a recovery in the case at bar having been overruled, the question was submitted to the jury upon petitioner's claim that the facts briefly outlined above disclosed a combination or conspiracy between the two respondents in restraint of trade or commerce among the several states, and to monopolize or attempt to monopolize the warehouse business in the Philadelphia district.

The Trial Judge submitted three questions to the jury:

(1) "Have these Defendants conspired or combined in an unlawful combination or conspiracy in restraint of trade, or to create or promote a monopoly in matters which concern interstate commerce?" (R. 543.)

(2) "Has the Plaintiff suffered any loss in business or property by reason of that unlawful combination if you find the unlawful combination to exist." (R. 544.)

(3) If you find in favor of the plaintiff "how much shall be your verdict." (R. 544.)

The verdict of the jury was in favor of petitioner in the amount of $136,125.00.

Motions for a new trial were overruled. The Court on motion trebled the amount of the verdict, allowed a counsel fee of $27,000.00, and directed the entry of judgment in the amount of $410,338.81.

On appeal from this judgment, the Court of Appeals for the Third Circuit reversed the case on the sole ground that the petitioner's right of action was barred by the prior pro-

ceeding before the Interstate Commerce Commission (*Pennsylvania Railroad Co., et al. v. Terminal Warehouse Company,* 78 F. (2d) 591—Record 658).

The case is now here on certiorari granted October 14, 1935.

## III. SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Third Circuit erred:

1. In its finding as follows: "We conclude that the present action is barred by the prior proceedings before the Interstate Commerce Commission."

2. In its order reading as follows: "Judgment Reversed."

3. In failing to affirm the judgment of the District Court.

## IV. THE QUESTIONS PRESENTED.

1. In an action at law against a carrier and a non-carrier to recover damages suffered as the result of a conspiracy to violate the Sherman Act, is the action barred as to the non-carrier by a denial of reparation to the injured party in a prior proceeding against the carrier before the Interstate Commerce Commission, in which proceeding the non-carrier intervened for the protection of its own interests, but in which no reparation was claimed or could have been awarded against the non-carrier?

2. In such a case is the action barred as to either party because in the previous proceeding before the Interstate Commerce Commission the injured party requested and was denied reparation which the Commission had no statutory authority to award?

3. In such a case is the suit against the carrier barred because in the previous proceeding reparation for injuries suffered was denied on the ground, as announced by the Commission, that the injuries sustained were not "attributable directly" to violations of the Interstate Commerce Act of which complaint was made, and which led to a cease and desist order?

4. Whether the evidence sustains the verdict of the jury in this case, that a conspiracy to violate the Sherman Act existed and that the damages awarded by the jury were suffered.

## V. SUMMARY OF ARGUMENT.

**1. The Denial of Reparation by the Interstate Commerce Commission Was Not a Bar to the Subsequent Suit Under the Sherman Act.**

The proceeding before the Interstate Commerce Commission was filed by petitioner against respondent Railroad Company to stop the practice of paying allowances to respondent Merchants Company, and included a prayer for reparation. Respondent, Merchants Company, was not a party to the proceeding, although it voluntarily intervened. The refusal of the prayer for reparation could not under any circumstances bar a subsequent suit against the Merchants Company because the Interstate Commerce Commission had no statutory authority to award reparation against the Merchants Company even if it had been requested.

Neither was the denial of reparation in said proceeding a bar to a subsequent action against both respondents for injuries for violation of the Sherman Act. The Commission had no statutory authority to award the damages claimed even against respondent Railroad Company, because, as the Commission found, they were not "attributable directly" to the unlawful violations of the Interstate Commerce Act of which complaint was made. The action in the case at bar is for damages resulting from the conspiracy to violate the Sherman Act, and the injuries were directly attributable to that cause.

**2. The Evidence Sustains the Verdict of the Jury That a Contract, Combination or Conspiracy Existed to Violate the Sherman Act.**

The evidence showed that the two respondents had made an agreement whereby respondent Railroad Company granted certain favors to the Merchants Com-

pany and not to other warehouses on its lines, including allowances ostensibly for handling freight, the furnishing of free siding connections and facilities, active assistance in the solicitation of warehouse freight, and permission to allow inbound loaded cars to remain indefinitely upon its tracks without demurrage charges, and whereby respondent Merchants Company agreed to give to respondent Railroad Company all the shipments it could control, to accord preferential treatment to traffic moving over the Railroad Company's lines and not to extend the use of its facilities to traffic of other railroads. The principal part of warehouse freight moving in and out of the warehouses of the Merchants Company was interstate in character. The agreement was carried out by both parties and respondent Merchants Company made full use of the advantages and favors granted it by establishing unfair rates and practices which diverted business from other warehouses and from other carriers, and tended to create a monopoly.

**3. The Evidence Supports the Verdict of the Jury as to the Damage Suffered.**

The evidence clearly showed that in carrying out the conspiracy aforesaid respondent Merchants Company established grossly unfair warehouse rates and practices, involving the furnishing of free service in many cases, and that in consequence thereof the petitioner suffered heavy loss in the actual handling of business which passed through its warehouses during the period in suit. No claim was made for business which petitioner lost in consequence of unfair competition, but only actual pecuniary loss sustained by reason of the necessity of giving free service or lowering its rates to meet the unfair competition aforesaid. The verdict was very moderate in amount and no complaint is made of the Judge's charge.

## VI. ARGUMENT.

### 1. The Denial of Reparation by the Interstate Commerce Commission Was Not a Bar to the Subsequent Suit Under the Sherman Act.

The proceeding held by the learned Circuit Court of Appeals to bar petitioner in this action was begun in 1928 by the filing of a formal complaint with the Interstate Commerce Commission assailing the payment of allowances by the Pennsylvania Railroad Company as illegal and praying for reparation (R. 451). Respondent Railroad Company was the only defendant in that proceeding, although respondent Merchants Company voluntarily intervened for the protection of its interests (R. 473-475).

Petitioner, in connection with the presentation of its case offered evidence of shrinkage or diminution of its normal business profits due to the unfair competition it encountered (R. 484, 494-498). The Commission ruled that the allowances constituted unlawful rebates, but, upon application by petitioner for a further hearing at which it proposed to offer evidence of the amount of loss sustained by it, held that such further hearing should be refused, stating that the proof which had been submitted was "too vague and indefinite to warrant the conclusion that complainants have suffered actual pecuniary loss attributable directly to the alleged unlawful practices." (R. 484.) Reparation was therefore denied.

It is this ruling by Division 3 of the Interstate Commerce Commission (R. 476-485) which the court below holds bars the petitioner from prosecuting the case at bar, which is an action at law for violation of the Sherman Act, brought against the carrier involved in the proceedings be-

fore the Interstate Commerce Commission and also against a non-carrier which was not named as a defendant in that case, although it voluntarily intervened.

There are several respects in which we urge that the learned Court of Appeals for the Third Circuit erred in reaching its conclusion.

Its decision was based on the assumption that petitioner in the proceeding before the Interstate Commerce Commission could have recovered the damages alleged, had its evidence been sufficient, not only against respondent Railroad Company but also against respondent Merchants Company. The Court's language on the latter point was:

> "Merchants voluntarily became a party to that proceeding, thus enabling the complainants, including Terminal, to press their claim against the favored shipper as well as against the carrier." (R. 661.)

The Court of Appeals therefore concluded that as, in its view, petitioner could have recovered against both respondents had its evidence been sufficient, it could not thereafter recover against either in an action under the Sherman Act in another tribunal.

It is respectfully submitted that in so holding the Court of Appeals erred in two particulars: (1) In holding that a reparation claim could have been successfully urged before the Commission against Merchants Warehouse Company, a non-carrier; (2) In holding that *any* award of reparation could have been made against either respondent in view of the fact found by the Commission that the damages suffered were not "*attributable directly*" to the payment of allowances which was the violation of the Interstate Commerce Act of which complaint was made. These two points will be considered in order.

(1) Sections 8 and 9 of the Interstate Commerce Act, printed in full in the margin,[2] expressly provide that the remedy afforded by that act to the party injured shall be against the common carrier guilty of violation of said act. These are the only sections of that act which confer a right upon a party injured to recover reparation by award of the Commission, and the only statutory authority enabling the Commission to award reparation.

Section 8 provides that "in case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful . . . such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter."

This is the clause quoted by the learned Court of Appeals for the Third Circuit as permitting full damages to be recovered, whatever they may be, and it is clear that it

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[2] *Section 8 of the Interstate Commerce Act* reads as follows:

"LIABILITY IN DAMAGES TO PERSONS INJURED BY VIOLATION OF LAW. In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." (Feb. 4, 1887, c. 104, § 8, 24 Stat. 382, 49 U. S. C. § 8.)

*Section 9 of the Interstate Commerce Act* reads as follows:

"Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." (Feb. 4, 1887, c. 104, § 9, 24 Stat. 382, 49 U. S. C. § 9.)

refers only to the recovery of damages against a common carrier.

Section 9 is equally clear, giving a right of action to any "persons claiming to be damaged by any common carrier subject to the provisions of this chapter" with the proviso that such person may either make complaint before the Commission for carrier liability only, or bring suit in court, but cannot do both.

With great respect for the opinion of the learned Court below, we contend that its holding that a reparation claim could have been successfully pressed against the Merchants Company was error. There is no provision in the act whereby the Commission may award reparation against anyone other than a carrier.

Congress has provided otherwise for cases in which it is claimed that a non-carrier is liable for damages suffered by a shipper. An action at law may be brought in court, where the non-carrier has induced or solicited the payment of unlawful rebates, under Section 10(4) of the Interstate Commerce Act (printed in the margin [3]): *Dusenberry v. Lehigh Valley R. R. Co., et al.*, 268 Fed. 1009; or, in case the non-carrier has conspired with the carrier to violate the Sherman Anti-Trust Law, a suit may be brought under

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[3] *Section 10 (4) of the Interstate Commerce Act,* reads in part as follows:

"If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this chapter, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination . . . such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom. (Feb. 4, 1887, c. 104, § 10, 24 Stat. 382; Mar. 2, 1889, c. 382, § 2, 25 Stat. 857; June 18, 1910, c. 309, § 10, 36 Stat. 549; and Feb. 28, 1920, c. 91, § 414, 41 Stat, 483; 49 U. S. C. § 10 (4).)

Section 4 of the Clayton Act (printed in full in the margin [4]).

It is quite clear, however, that the liability of a non-carrier cannot be made the basis of an award by the Interstate Commerce Commission.

Moreover, reparation was sought only against the carrier, respondent Railroad Company, not against the non-carrier (R. 451, 486). Even if the Commission had the power to award reparation against the non-carrier, it could not award it where it was not sought.

The fact that the non-carrier intervened for its own purposes as above noted does not affect this conclusion. The claim for reparation was pressed only against the Railroad Company; the record indicates that the Merchants Company took no part in this branch of the case (Defendants' Exhibit 12, R. 450-523).

Aside from these considerations, which relate only to the terms of the statutes, it is well settled that a suit against one of two joint tort-feasors which does not result in a recovery and a satisfaction of judgment, is no bar to a suit against the other (*Bigelow v. Old Dominion Copper Co.*, 225 U. S. 111), and this is true even though, as in the case cited, both joint tort-feasors participated in the defense of the first suit which resulted favorably to the defendant. Ibid, page 126.

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[4] *Section 4 of the Clayton Act*, reads as follows:

"SUITS BY PERSONS INJURED; AMOUNT OF RECOVERY. Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Oct. 15, 1914, c. 323, § 4, 38 Stat. 731; 15 U. S. C. § 15.)

A similar provision is found in the Sherman Act, § 7, restricted in its operation to the particular act.

Petitioner could have proceeded against the Merchants Warehouse Company as the sole defendant in the case at bar, naming the Pennsylvania Railroad Company as the other conspirator in its complaint, or it could have dismissed its complaint insofar as the Pennsylvania Railroad Company was involved and claimed all of its damages from the Merchants Warehouse Company which, as one of the joint tort-feasors, was liable for all or any part of the damage: *Story Parchment Co. v. Paterson Co.*, 282 U. S. 555; *Eastman Kodak Co. v. Southern Photo Co.*, 273 U. S. 359; *Sessions v. Johnson*, 95 U. S. 347; *Scott v. Saunders*, 290 Fed. 30, 33; *Motley, Green & Co. v. Detroit Steel & Spring Co.*, 161 Fed. 389, 397; *McDonald v. McAdams*, 151 Fed. 781.

We submit, therefore, that there is no basis whatever for the decision of the learned Circuit Court of Appeals that petitioner is barred from proceeding against the Merchants Company because it requested the Interstate Commerce Commission to make an order of reparation against the Railroad Company, which request was refused. Its action in reversing the judgment against the Merchants Company on this ground could, therefore, in no event be sustained.

(2) In this case, however, we submit that petitioner is not barred against either respondent by anything which was done in the proceedings before the Interstate Commerce Commission.

The opinion of the learned Circuit Court of Appeals for the Third Circuit is based on the assumption that petitioner had elected its remedy and that, under the provisions of Section 9 of the Interstate Commerce Act (quoted in full in the margin, supra page 15), it could not afterwards pursue any other remedy in another tribunal.

A necessary prerequisite to the application of this rule, however, is the jurisdiction of the Commission to award the damages claimed. If it has no such jurisdiction, the reparation claim filed with the Commission may be treated as a nullity, and the claimant may pursue such other remedy as he finds available. *Ash Sheep Co. v. United States,* 252 U. S. 159; *Larsen v. Northland Transportation Co.,* 292 U. S. 20; *Midland Savings & Loan Co. v. Tradesmen's Nat. Bank,* 57 F. (2d) 686, certiorari denied 287 U. S. 615; *Henderson Tire & Rubber Co. v. Gregory et al.,* 16 F. (2d) 589. In the case last cited the court said (p. 594):

> "The foregoing cases also establish the proposition that if the remedy first sought was not available, it is immaterial *why* this was so—whether because the assumed facts did not exist, or because the facts did not as a matter of law entitle plaintiff to the relief sought. In either instance, the doctrine of election of remedies does not apply."

See also *Southern Pacific Co. v. Bogert et al.,* 250 U. S. 483; *William W. Bierce, Ltd. v. Hutchins,* 205 U. S. 340, 346-347; *Wheeling & L. E. R. Co. et al. v. Carpenter et al.,* 264 Fed. 772, 776; *Bistline v. United States,* 229 Fed. 546.

It is of course too clear for discussion that petitioner could not have recovered, in proceedings before the Interstate Commerce Commission, for damages suffered in consequence of a violation of the Sherman Anti-Trust Law.

The learned District Judge said on this point (R. 607-608):

> ". . . The right of action given by the Commerce Acts is purely statutory. The conduct of common carriers engaged in interstate commerce is by those Acts subjected to supervision and acts found to be unlawful may be denounced and condemned. An injured party

is given a right of action to recover reparation. There is no right of action until and only as unlawfulness is found. The Commission is given judicial or semi-judicial power to find, when the power is invoked, the reparation to which a complainant has the right. The jurisdiction of the Commission is restricted to common carriers and its awards so limited . . .

"The present action has a wholly different basis. It was for a charged conspiracy to monopolize the Interstate part of the warehousing business. The Commerce Acts had directly nothing to do with it. The conspiracy would have existed and the damage recovered have been wrought if the practice of the carrier had not been found to have been unlawful. The wrongfulness of the practice did not affect the existence of the conspiracy, its unlawful character or the damage suffered by the plaintiff. The Commission could award damages only against the carrier qua carrier and for some practice as carrier condemned as unlawful. It would have no jurisdiction to award damages against conspirators who were not carriers but in an unlawful conspiracy to do some act with which the Commerce Acts did not concern themselves. The fact that one of the conspirators was a carrier would not confer jurisdiction."

Respondents have argued and will, no doubt, again argue in this Court that, conceding that the causes of action are entirely different, petitioner nevertheless might have recovered the damages awarded in the case at bar in the action before the Interstate Commerce Commission, by way of reparation from the Pennsylvania Railroad Company for its unlawful payment of allowances, if its evidence had been of a nature satisfactory to the Commission, and that therefore, as damages were denied, petitioner's remedy is gone.

We turn then to the question whether the damages sustained by the petitioner and proven to the satisfaction of the jury in the case at bar, could have been recovered by way of reparation from respondent Railroad Company in the proceeding before the Interstate Commerce Commission.

It is well settled that although reparation may be awarded by the Commission for injuries to the business of a claimant, the claimant must show that some specific acts on the part of a carrier, such as the payment of rebates, constituting violations of the Interstate Commerce Act, were the proximate cause of those injuries: *Texas Sugar Refining Co. v. Beaumont, Sour Lake & Western Ry. Co., et al.*, 152 I. C. C. 133, 135-136; *Gannaway et al. v. Illinois Central R. R. Co. et al.*, 120 I. C. C. 400, 403-404; *Pittwood v. Northern Pacific R. R. Co.*, 51 I. C. C. 535.[5] If the damages did *not* result from such specific acts but from an intervening cause such as the acts of a non-carrier, a situation is presented where the claim must be proven before a jury in the ordinary course of law, and damages cannot be awarded by the Commission.

In the case at bar, it appeared that the injuries suffered by the petitioner were due to unfair competition which it encountered from respondent Merchants Company. The Merchants Company established unfair warehouse rates and practices in the Philadelphia district calculated to attract business from its competitors, and to secure a monopoly for the Merchants Company of at least a large portion of warehouse package freight. These practices were such as could not be met without severe loss by any competitor who did not receive advantages, favors, and assist-

[5] The general principles governing proximate causation have been fully considered in *Milwaukee and St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469; *Nirdlinger v. American District Telegraph Co.*, 245 Pa. 453; and *Garrison v. Sun Printing and Publishing Assn.*, 207 N. Y. 1, 7.

ance from the carrier, which advantages, favors, and assistance were afforded the Merchants Company in aid of the conspiracy alleged and proven in this case. The motive on the part of the Railroad Company was to gain traffic, and the motive on the part of the Merchants Company was to gain increased business. The conspiracy necessarily involved diverting interstate commerce from the lines of other carriers, and at least tended to secure for the Merchants Company the monopoly of the warehouse business in the Philadelphia district.

If it had not been for the joint purpose of the two conspirators to accomplish these purposes it would not have been necessary for the Merchants Company to go to the extremes to which it did go in offering favors, advantages and lowered rates to its customers and to establish practices which could not possibly be met by other warehouse companies without heavy loss. It was clearly demonstrated that the Merchants Company (and one other warehouse company favored by another railroad) secured a practical monopoly of the "heavy density" business, consisting of bags of flour, bags of cement, and other such products because as to them no other warehouse company could absorb the heavy cost of handling a large portion thereof, as it was necessary to do in order to meet the competition of the Merchants Company (R. 195-196). There can be no question as to the reality of the loss which would necessarily be sustained by competitors of the Merchants Company in attempting to do business under these conditions. There is no doubt of the severe loss which petitioner has sustained. The question now before us is whether this loss and injury is such as can be said to have resulted from specific violations of the Interstate Commerce Act by the Railroad Company.

A brief consideration of the facts makes it clear that there was an independent cause which occasioned the damage suffered, to wit, the conspiracy aforesaid and the acts of the Merchants Company in pursuance thereof. The loss sustained was not due directly to the payment of any allowances but to the necessity of meeting the standards set up by the Merchants Company. It is clear from the testimony that it is impossible to say that the allowances received by the Merchants Company were "passed along" to its customers in any real sense. The allowances were paid on all freight, both incoming and outgoing, handled by the Merchants Company. An officer for that company testified that the actual cost of handling freight was greater than the allowances (R. 262). The Merchants Company did not give free handling service on all its freight but only on that portion taken away within the forty-eight hours free time (R. 159, 376). The allowances received on other freight could be used otherwise. An advantage afforded by the Merchants Company to its customers, as the result of its conspiracy with the Railroad Company, almost as great as the privilege of removing their goods within forty-eight hours without charge, was the privilege of allowing the same to remain in railroad cars for many days without paying any demurrage, which the evidence shows was done throughout the statutory period in thousands of cases (R. 169, 239, 240, 243, 279, 311-313, 357-358, 364, 369. Plaintiff's Exhibit 20). This in effect gave Merchants Company an unlimited extension of its storage facilities in the cars of the carrier. The Merchants Company also had the advantage of free use of railroad facilities (Plaintiff's Exhibit 1, R. 18-93). These additional advantages were not mentioned in the complaint filed with the Interstate Commerce Commission, were not referred to in the proceedings before that tribunal,

and were, of course, not made the basis of any claim for reparation.

All of these advantages, absorbed by the Merchants Company, made possible its competitive action in obtaining warehouse business. It is impossible to trace the payment of any allowance or rebate directly into pecuniary loss to petitioner because the proximate cause of petitioner's injury was not railroad rates or allowances but the unfair warehouse practices and shrunken warehouse rates of the Merchants Company. This is well illustrated by a reference to Plaintiff's Exhibits 7, 8 and 9, letters from the Merchants Company to prospective customers offering free handling, free storage for forty-eight hours (R. 158, 159), and freedom from demurrage charges (R. 163). It was offers such as these which constituted the unfair competition petitioner was obliged to meet, and it is quite clear that it is impossible to say that the loss plaintiff suffered by reason of having to reduce its rates to meet this competition was directly attributable to the payment of allowances.

This gap between cause and effect was pointed out in the proceedings before the Interstate Commerce Commission by respondent Railroad Company in opposing petitioner's application for rehearing. It alleged in its answer that the claim for reparation must fail in the absence of proof "that the complainants have sustained damages *as a result of any infraction of the Interstate Commerce Act by the defendant in this proceeding*" (R. 501). Later in the answer it is alleged that the complainant, in order to show a right to reparation, would have to prove that its damage resulted from the fact that a subsidized warehouse "had received payment from the defendant" (R. 503). Finally, summing up its position, the Railroad Company asserts (R. 505):

> "What they [complainants] have failed to show in this case is that the alleged wrong of the Pennsylvania operated to their injury. They leave wholly uncertain the answer to the question: 'Which act of which carrier is supposed to have injured any particular complainant in any specific transaction?' "

These arguments of respondent Railroad Company convinced the Commission that the injuries unquestionably shown in that case as in this (the Circuit Court of Appeals says the evidence of injury was the same in both, R. 663) were not caused directly or proximately by the payment of rebates and therefore that the Commission had no jurisdiction to award them. The conclusion of the Commission was expressed in the following words:

> "The evidence is far too vague and indefinite to warrant the conclusion that complainants have suffered actual pecuniary loss attributable directly to the alleged unlawful practices" (R. 484.)

This conclusion was clearly not a finding that no injury had been suffered by petitioner, which under the admitted facts would be impossible, but only that the injuries which it had shown were not "*attributable directly*" to the alleged practices of which complaint had been made; in other words, that the payment of the allowances was not the proximate cause of the injuries which petitioner suffered.

Respondents argue in their brief in opposition to the petition for writ of certiorari that petitioner did not prove any injuries in the case before the Interstate Commerce Commission. This argument can have little weight in view of the statement in the opinion of the learned Circuit Court of Appeals to the effect that the testimony to prove damages in both cases was substantially the same, the testimony being well summarized by the court (R. 662). The evidence pre-

sented to the Commission did prove beyond question that complainant had been injured: what it failed to show was that that injury was directly attributable to the unlawful practices of the carrier there complained of. On the contrary, the evidence showed that the injuries were not directly attributable to such practices, but that they were caused by acts of the Merchants Company, a non-carrier, and any additional evidence presented would (as has been clearly demonstrated by the evidence produced in the case at bar) only have emphasized the fact that the proximate cause of petitioner's unquestioned injury was not any act of the common carrier constituting a violation of the Interstate Commerce Act, but acts of the Merchants Company, a non-carrier, pursuant to a conspiracy in violation of the Sherman Act. The injuries were, therefore, not compensable in an action before the Commission. The Commission so ruled and the decisions of the District Court in the case at bar are in harmony with that ruling. The holding of the Circuit Court of Appeals that the damages for which compensation was given in the case at bar could have been recovered in the action before the Commission is, therefore, at variance not only with the decisions of the District Court in the case at bar, but with that of the Commission in the former proceedings.

Petitioner, of course, could not appeal from the Commission's decision: *Interstate Commerce Commission v. United States ex rel. Campbell,* 289 U. S. 385, 388; *Standard Oil Co. v. United States et al.,* 283 U. S. 235, 238; *Procter & Gamble Co. v. United States et al.,* 225 U. S. 282; although the learned Court below refers to its failure to appeal as if that fact were significant (R. 662).

Petitioner, on the other hand, accepted this decision as a definite finding that its injuries were not of such a nature

as could be the basis of an award by the Interstate Commerce Commission, and considered the finding of the Commission to be a denial of its jurisdiction to award such damages. It thereupon filed this suit to recover upon an entirely different cause of action, alleging the true cause of its injuries to be the conspiracy aforesaid. Now the Railroad Company, reversing its position before the Commission, argues that petitioner could have recovered reparation before the Commission for the injuries which it unquestionably sustained. In its brief in opposition to the petition for writ of certiorari (p. 15) the Railroad Company asserts that it did not question the power of the Commission to award reparation, but the above quoted excerpts from its answer to the petition for rehearing clearly show otherwise.

The fallacy of the argument presented here by respondents is clearly shown by one sentence in their brief in opposition to the writ for certiorari (page 23) in which they say:

> "Having elected to pursue its remedy under the Interstate Commerce Act, petitioner was restricted to recovery under that Act."

This statement, if correct, would lead to the conclusion that although a petitioner had mistakenly sued to recover damages for violation of the Sherman Law before the Interstate Commerce Commission, and the Commission had very properly denied its jurisdiction it could not thereafter have sued in court, a proposition which carries its own answer.

It has been repeatedly held, as we have previously pointed out (supra, page 19) that a proceeding in one court in which judgment could not have been recovered because of lack of jurisdiction or for some similar reason, is no bar to subsequent action in another court, and it is equally well settled that where the cause of action in the second suit differs in substance from that in the first suit,

a judgment in the first case is not a bar to the second, even though the injuries sued for in both cases were exactly the same: *Troxell v. D. L. & W. Railroad Co.*, 227 U. S. 434, 442-443; *Baltimore Steamship Co. v. Phillips*, 274 U. S. 316, 319.

We further suggest that if the decision of the Interstate Commerce Commission were to be considered binding upon the parties in this suit, it could be binding only as to what the Commission actually decided, which was that the injuries shown were not "*attributable directly*" to the payment of the allowances. This is a finding by a competent tribunal to the effect that the injuries suffered in this case could not be awarded by the Interstate Commerce Commission because they were not such as that Commission has jurisdiction to award.

We therefore submit in concluding this branch of the argument: (1) That the denial of reparation by the Interstate Commerce Commission does not bar a subsequent action against the Merchants Company from whom no reparation was asked and against whom it could not have been awarded. (2) That such denial is not a bar to subsequent proceedings under the Sherman Anti-Trust Law against both respondents, because the Commission, as it found, had no jurisdiction to award the reparation requested, and for the further reason that the causes of action in the two cases are entirely different.

**2. The Evidence Sustains the Verdict of the Jury That a Contract, Combination or Conspiracy Existed to Violate the Sherman Act.**

Respondents contended in the court below and allege in their brief in opposition to the petition for writ of certiorari (p. 24) that "no conspiracy in violation of the Sherman Act was shown."

Of course, the only question involved here is whether the verdict of the jury was sustained by evidence.

The undisputed evidence disclosed that a series of contracts between the two respondents required Merchants Company to route all freight shipments within its control over the lines of respondent Railroad Company, to accord preferential treatment to traffic moving over those lines and not to extend the use of its facilities to traffic of any other railroad. In return, the Railroad Company agreed to pay the Merchants Company certain sums, ostensibly for handling freight at its warehouses, and to furnish siding connections and facilities without expense to the Merchants Company. (Plaintiff's Exhibit 1, R. 18-93). In certain of the agreements Railroad Company bound itself not to enter into similar agreements with any other warehouse company.

These contracts were carried out by both parties for many years. Practically all freight destined to or coming from the warehouses of the Merchants Company was routed over the lines of the respondent Railroad Company (Defendant's Exhibit 6, R. 273, 443-449); the Railroad Company fully carried out its part of the agreement, did not enter into similar arrangements with any other competitive warehouse company and did not pay any allowance to any other competitive company (R. 60).

In order further to promote the purposes of the contracts the Railroad Company designated the warehouses of the Merchants Company as freight stations (R. 371-372) and actively solicited freight to be consigned thereto. (Plaintiff's Exhibit 3, R. 154.) It also in effect granted to Merchants Company unlimited storage on its tracks at Philadelphia of freight in cars exempt from demurrage (R. 169 279, 369), although demurrage was charged plaintiff and

other competing warehouses under similar conditions (R. 185). It requires no argument to show that if one warehouse company is obliged to unload all the cars consigned to it immediately, upon pain of paying demurrage charges, and the other is permitted to unload them when convenient, or, if it is more convenient to its customers, to allow goods to remain in the cars indefinitely without charge, this is of great benefit to the favored warehouse company and in effect gives it an unlimited extension of its storage facilities in the cars of the carrier.

The Merchants Company made full use of the favors and advantages granted it, by establishing unfair warehouse rates and practices which were intended to and did divert business from other warehouses and other carriers.

It would seem incontestable that these contracts, and arrangements, the express purpose of which was to divert traffic from other carriers to the lines of Pennsylvania Railroad Company and from other warehouses to that of Merchants Company were in restraint of trade or commerce among the several states and that the necessary effect thereof was to monopolize or at least tend to monopolize part of interstate trade or commerce.

As was said by this Court in the case of *Merchants Warehouse Company v. United States,* 283 U. S. 501, at page 505:

> ". . . Shippers using public warehouse facilities generally select the company offering the lowest aggregate charge for the distribution of their goods, and, by reason of the allowances made, the contract warehouses are able to quote lower prices than their competitors, thus securing business which would otherwise go to the latter. The primary motive for the payment of the allowances to the contract warehouses is to gain

traffic, and the allowances are compensation to appellants for their solicitation of freight movements over the lines of the carriers."

It was also proven that the Railroad Company owned a considerable block of the stock of Merchants Company (R. 140).

Respondents argue that they in fact achieved no monopoly. This is, of course, not of controlling importance. The Sherman Act condemns all combinations "such as have a direct, natural, and evident tendency to create monopoly —that is, monopoly (or the power to monopolize) may be expected to result therefrom": *United States v. Standard Oil Co. of New Jersey*, 47 F. (2d) 288, 298; regardless of their practical success: *United States v. E. C. Knight Co.*, 156 U. S. 1, 16; *United States v. Patten*, 226 U. S. 525, 543; *Anderson v. Shipowners Association of the Pacific Coast, et al.*, 272 U. S. 359, 363; *Montague & Co. v. Lowry*, 115 Fed. 27, 30 (affirmed 193 U. S. 38). If petitioner and other warehouse companies by the exercise of great diligence and sacrifice of profits succeeded in holding a measure of business, they did not thereby lose their right to recover damages for the injuries sustained.

If other railroad companies, by the use of methods similar to those which were adopted by the Pennsylvania Railroad Company, thereby secured or retained a portion of the transportation of package freight over their lines, this cannot affect the right of the petitioner to recover for the injury suffered.

The fact that respondents did not obtain a complete monopoly either of the transportation of package freight or of the warehouse business, cannot be ascribed to defects in their plans or to forbearance in their efforts to carry it out.

The power of common carriers to create unlawful monopolies invited comment by this court in *New York, N. H. & H. R. Co. v. Interstate Com. Com.*, 200 U. S. 361, 393; and in *Swift and Company v. United States*, 196 U. S. 375, 402, this Court said that "no more powerful instrument of monopoly could be used than an advantage in the cost of transportation". See also *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, and *United States v. Joint Traffic Assn.*, 171 U. S. 505.

It is clear that the concerted action of respondents did seriously affect and restrain the flow of interstate commerce, and did create at least a partial monopoly of the warehouse business, especially that relating to "heavy density" package freight (R. 196, 223).

It was argued in the court below and is asserted in respondents' brief in opposition to the petition for writ of certiorari (p. 24) that "A general warehouse business in Philadelphia is not interstate commerce and subject to the Sherman Act."

The question involved is not whether the general warehousing business is interstate commerce but whether petitioner was injured as a result of a contract, combination or conspiracy to restrain interstate commerce or to create a monopoly in such commerce or some portion thereof.

The evidence is clear that the object of the contract, combination or conspiracy was to increase the flow of package freight over the lines of respondent Railroad Company into the warehouses of respondent Merchants Company, and it is undisputed that the overwhelming volume of shipments of package freight into and from the warehouses was interstate in character (R. 175-183, 246, 265-273, Plaintiff's Exhibits 19 and 20).

The proposition that the Sherman Act condemns conspiracies to restrain or monopolize interstate commerce, even though they may be carried out by acts constituting

intrastate transactions, and that a plaintiff need not be himself engaged in interstate commerce to recover under the Sherman Act for damages caused by such a conspiracy is fully sustained by the following cases: *Ramsay Co. v. Associated B. P. of U. S. and C.*, 271 Fed. 140 (reversed on other grounds, 260 U. S. 501); *Sullivan v. Associated B. & D. of U. S.*, 272 Fed. 323 (reversed on other grounds, 6 F. (2d) 1000); *United States Copper Securities Co. v. Amalgamated Copper Co.*, 232 Fed. 574; *Binderup v. Pathe Exchange*, 263 U. S. 291; *Chattanooga F. & P. Works v. Atlanta*, 203 U. S. 390; *Hood Rubber Co. v. United States Rubber Co.*, 229 Fed. 583. See also *Local 167 v. United States*, 291 U. S. 293.

### 3. The Evidence Supports the Verdict of the Jury as to the Damage Suffered.

Respondents argued in the court below and assert on page 24 of their brief in opposition to the petition for writ of certiorari, that "the proofs failed to show any damage suffered by petitioner."

In view of the admitted and undisputed facts a consideration of this point seems scarcely necessary.

However, it may be pointed out that petitioner's claim for damages was confined to pecuniary losses on business actually transacted by it which it had been forced to do for nothing or at less than a normal and proper charge, in order to meet the unfair competition to which it was subjected as a result of the conspiracy.

As proof of the amount of damages sustained on business actually handled, petitioner offered the testimony of its president supported by an elaborate schedule which he had prepared consisting of five volumes of typewritten

sheets. His description of the schedule was in the following language (R. 197):

> "I prepared a statement of all the tonnage, carload tonnage, received by us during this period, and on that statement I have indicated the date of arrival of the car at our warehouse, the car initials and number, the point of origin, the name of the commodity, weight of consignment, the contract rate, or the rate at which we were forced to take this business at, and the normal rate that we would have obtained had it not been for the terminal allowance, and the difference in dollars and cents.. . ."

From the schedule he omitted any shipments as to which there was no sufficient data, and he also omitted all shipments passing through the warehouse on which petitioner did not meet the unfair competition and was able to make normal charges (R. 197).

By means of this schedule petitioner's president was able to testify as to the total amount which the petitioner did receive for handling shipments of the character described passing through the warehouse during the statutory period, and the amount it would have received had it not been for the unfair competition resulting from the conspiracy. The amount so ascertained and testified to by the petitioner's president was more than three times the amount of the verdict of the jury.

Respondents' criticism of this method of proving the amount of damages is based on their contention that petitioner's "so-called 'normal rate' was an arbitrary rate wholly unrelated to 'prevailing rates' and afforded no standard for measuring damages." Such a criticism is technical rather than substantial. The substance of the testimony of petitioner's president was a careful estimate

of the amount which it would have received for services rendered, carefully itemized, had it not been for the unfair competition.

However, in answer to the contention that no "normal rate" or "regular rate" was established, it should be pointed out that witness Sullivan included in the statement a copy of "Terminal Warehouse Company, handling package rate tables for bags, cartons, cases, crates and metal ingots", being a regular schedule of all its rates (R. 238).

He testified that these rates were "predicated upon the cost of service" and were the rates which petitioner had to get "in order to pay for the cost of the service" (R. 213). (See *Story Parchment Co. v. Paterson Co.*, 282 U. S. 555, 561.) He testified that petitioner always attempted to get these rates and cut them only to the extent necessitated by the competition established by respondent, Merchants Warehouse Company (R. 197, 214-217, 226). This schedule, as well as the entire compilation, was submitted to counsel for respondents for their examination and they had every opportunity to attack the figures contained in the compilation or in the rate table had they chosen so to do (R. 238).

Some days later, during the presentation of their defense, they called petitioner's president as their witness and questioned him in respect of the warehouse rates on only two commodities, flour and canned goods (R. 378-380). Their next witness, Mr. Justice, testified that he heard this testimony of petitioner's president and, expressing an opinion, testified that he never heard of any one getting such rates. His cross-examination disclosed a higher rate on canned goods published in a tariff of respondent Merchants Company (R. 380-384). Having had ample opportunity to reveal, by analysis and testimony of their experts, any infirmity attributable to petitioner's five-volume state-

ment, its tariff, and its warehouse rates published in the tariff, we submit that their failure to do so attests the substantial accuracy of the statement, tariff and rates, and of the estimate of petitioner's president, based thereon.

The weight to be given petitioner's estimate was, of course, for the jury. Of its admissibility, we submit, there can be no doubt: *William H. Rankin Co. v. Associated Bill Posters of U. S., etc.*, 42 F. (2d) 152 (C. C. A. 2d, certiorari denied, 282 U. S. 864.

See also *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 563, in which this Court said:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

Respondents have also contended that petitioner is not entitled to recover any damages because it appears that improper arrangements similar to that of which complaint is here made were also in effect between the Reading Company and the Baltimore & Ohio Railroad Company and certain other favored warehouses. All of this is entirely immaterial. That warehouse rates and practices in Philadelphia were in fact established by the acts of respondents

is abundantly clear. They initiated the unlawful practices and the two other carriers later adopted somewhat similar but less injurious practices as a measure of self-protection to avoid diversion of their traffic to the initial combination. (R. 251-256, 288, 289, 393, 395-399).

Petitioner's president testified (R. 214):

> "The rate here in Philadelphia was fixed by the Merchants Warehouse Company. They were the ones that got those allowances and had those privileges, which enabled them to establish the rate and everybody else in Philadelphia had to meet that rate."

And, on cross-examination, answering the suggestion that the other favored warehouse companies had also cut rates he said (R. 226):

> "But they didn't make the rates. The Merchants Warehouse made the rates. In other words, they cut the largest amount, and everybody had to go to the same level."

It thus appears not only that the rates and practices of the Merchants Company inflicted the injury, but that the combination composed of the two respondents would have caused petitioner's injury and damage in the absence of any other combination. Respondents are, therefore, liable for the full amount of that damage. *Allison v. Hobbs*, 96 Me. 26, 51 Atl. 245; *Gulf C. and S. F. Ry. Co. v. Cities Service Co.*, 273 Fed. 946, 951; *Graves v. C. & S. Telegraph Association*, 132 Fed. 387; *Stone v. Dickinson*, 87 Mass. 29; *Vandiver & Co. v. Pollak*, 107 Ala. 547, 19 So. 180; *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69; *Anderson v. Minn., St. P. & S. S. M. Ry. Co.*, 146 Minn. 430, 179 N. W. 45; *Kingston v. Chi. & N. W. Ry. Co.*, 191 Wis. 610, 211 N. W. 913.

It has been further argued that respondents could in no event be held liable for losses sustained by petitioner in handling freight which was not shipped over the Pennsylvania Railroad. Such a position is untenable. The wrong was a conspiracy to violate the Sherman Act. The injury occasioned by that wrong was the establishment of unfairly competitive rates which petitioner had to meet. The rates having been established, the petitioner necessarily had to meet them as to any traffic which presented itself, whether it came over the lines of the respondent railroad company or otherwise. It is an entirely immaterial circumstance that some of it, or even that the bulk of it, may have been brought to petitioner's warehouses by other carriers.

Petitioner's proof of damage was exceptionally clear and definite and fully sustains the comparatively small award made by the jury. There is no complaint of the *amount* of the verdict, which falls far short of the sum which would be compensatory for the injury sustained by petitioner and the actual damages to its business which the evidence shows.

**4. Conclusion.**

This case was very carefully tried and resulted in a verdict of a very moderate amount; the total amount of the judgment is less than the damages proven by the petitioner. There is no criticism of the Judge's charge to the jury. It is submitted that nothing which took place before the Interstate Commerce Commission operates to bar the present action as against either or both respondents.

The evidence fully supports the verdict of the jury in finding that a combination or conspiracy to violate the Sherman Act existed and fixing the amount of damages.

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Third Circuit should be reversed and the judgment of the District Court affirmed.

JOHN J. HICKEY,
WALTER W. AHRENS,
835 Southern Building,
Washington, D. C.
THOMAS RAEBURN WHITE,
RICHARD C. BULL,
WHITE, MARIS & CLAPP,
1930 Land Title Building,
Philadelphia, Pa.
WILLIAM A. SCHNADER,
1719 Packard Building,
Philadelphia, Pa.